81-12

Office-Supreme Court, U.S.
FILED
JUL 6 1981
ALEXANDER L. STEVAS,
CLERK

No. _____

SUPREME COURT

OF THE UNITED STATES

JULY TERM 1981

Hobert W. Fischer	)
	)
Petitioner	)
	)
	)
vs.	)
	)
	)
Robert A. Dakopolos	)
	)
Respondent	)

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Hobert W. Fischer
510 East 29th Avenue
No. Kansas City, MO 64116
(816) 471-2667

Pro Se

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner who had no choice but to take a chance and file a damage suit against two practicing attorneys, who had brought on his dilemma, set out in the facts of the case, should be allowed equal rights, a little bit of justice under the law, or at least a jury trial and a verdict by the jury.

2. Whether petitioner's pro se petition was really defective, so much as not to show he had been hurt.

3. Whether exploratory work that had been done by defense attorneys should have made a difference.

4. Whether the merits of the case, all the facts and proof of wrong-doing by defendants in the exhibits, were ignored.

5. Whether the cruelty by Richard Hoffman, licensed attorney, sending in his letter of appearance and setting aside my special-set jury trial date, without my

knowledge, permission or any kind of agreement, when all I wanted was a lawyer to do the trial in court for a day or two. The effect this had.

6. Whether the arranging or agreeing to a trial on the time limits only, with Judge Meyers, and defense attorneys, for defendants who were also their own attorneys, all knowing that my time limits had not run, yet ruled in favor of the defendants anyhow, was in any way proper and just.

7. The effect of Richard Hoffman's second surprise appearance, just before the hearing by Judge Moore and appearing in person at the hearing, being allowed to make a presentation ahead of petitioner, Judge Moore getting up and leaving when petitioner is talking trying to explain the case, he was not going to trace back, and leaving Hoffman's presentation out of the transcript.

8. Whether the order by Chief Judge

Solbert W. Wasserstrom of the Missouri Court of Appeals, rejecting petitioner's pro se brief was any way to do considering the many troubles that had been caused him by defendants and under the provision of Rule 84.08, he did not waive compliance with the provisions of Rule 84.04, to consider the appeal on its merits.

9. Whether the order and judgment of Judge Moore, dated March 10, 1980, was proper, inasmuch as he complained about the cause having a long and convoluted history and he would not trace back in its ancient and medieval history. Not the fault of petitioner. Ignoring the merits, and giving the defendant a new start, like from the beginning to be allowed to file a motion to dismiss for failure to state a claim, and sustaining that issue, causing petitioner more trouble and sending him back to the Missouri Court of Appeals.

10. Whether the Opinion filed

March 2, 1981, by Judge Kennedy should be rejected, for the reason he does not know what he is ruling on, as he is stating in the first paragraph, The Dismissed petition undertook to state a claim for malpractice in the handling of a personal injuries claim against the Missouri Pacific Railroad Company. Defendant Dakopolos never was on my case at any time.

11. Whether the order, by the Supreme Court of Missouri, denying the transfer of the cause on May 11, 1981, was in any way proper, leaving petitioner without explanation and way to go, and if their decision was a rubber stamp decision of Judge Kennedy, they too did not know what was going on.

PARTIES TO THE PROCEEDING

All parties to the proceeding are included in the caption of the case.

TABLE OF CONTENTS

	Page(s)
Parties to the Proceeding.	5
Opinions of the Courts Below	6
Jurisdiction of the Supreme Court. . .	8
Constitutional Provision Involved . .	9
Statement of the Case	9
Statement of Fact	9
Argument	20
Conclusion	27

OPINIONS OF THE COURTS BELOW

1. The Order Memorandum of Judge William Marsh of the Circuit Court, Jackson County Missouri, setting Case No. OV75-3267 on trial docket for the week of January 10, 1977, entered October 6, 1976. Appendix hereto marked Appendix A.

2. The Order by Judge Timothy D. O'Leary setting this cause for trial in Division 1, before Judge Marsh, entered December 29, 1977, appendix hereto marked Appendix B.

3. The order by Judge Robert A. Meyers sustaining the motion of each defendant for summary judgment against the plaintiff on February 7, 1978, dated February 15, 1978, is included in the appendix hereto marked Appendix C.

4. The opinion filed by Judge David J. Dixon of Missouri Court of Appeals, Western District, No. KCD 30124, dated July 31, 1979, is included in the appendix

hereto marked Appendix D.

5. The Order by Judge James A. Moore of Circuit Court, Jackson County, Missouri, informing he is taking dismissal motion under advisement and give withdrawal approval to Richard Hoffman, who had appeared again for the second time on his own, dated March 6, 1980, is included in appendix hereto marked Appendix E.

6. The Order by Chief Judge Solbert M. Wasserstrom, of the Missouri Court of Appeals, Western District, rejecting brief WD31681, dated June 30, 1980, is included in appendix hereto marked Appendix F.

7. The Order by Judge James A. Moore of Circuit Court, dismissing Robert A. Dakopolos, is included in the appendix hereto marked Appendix G.

8. The Order by Don W. Kennedy, Presiding Judge in the Missouri Court of Appeals, Western District, No. WD 31681,

dated March 2, 1981, is included in appendix hereto marked Appendix H.

9. The Order by the Missouri Supreme Court, denying transfer, May 11, 1981, is included in appendix hereto marked Appendix I.

JURISDICTION OF THE SUPREME COURT

A concise statement of the grounds on which the jurisdiction of the United States Supreme Court is invoked follows:

1. The date of order the transfer denied by the Missouri Supreme Court and the date of its entry is May 11, 1981.

2. There are no orders respecting a rehearing or granting an extention of time within which to petition for certiorari.

3. It is believed that Title U.S.C., Section 1254 - 1254 (1) confers on this Court jurisdiction to review the judgment or decree in question by writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment 14: Equal Rights Amendment 5:

No person shall ... be deprived of life, liberty, or property, without due process of law

STATEMENT OF THE CASE

The appellant, plaintiff, petitioner, filed a petition for malpractice against Allan R. Browne and Robert A. Bakopolos, respondent, both practicing attorneys. The claim relates to a suit filed on behalf of plaintiff by defendant Allan R. Browne against plaintiff's former employer, the Missouri Pacific Railroad Company, and plaintiff's union, the Brotherhood of Railroad Trainmen.

STATEMENT OF FACT

On February 9, 1964, it was claimed by railroad officials that anonymous calls were made from a phone in the freight yard

in Kansas City. An investigation was made on February 11, 1964, concerning the responsibility of the plaintiff for the telephone call. Upon the basis of that investigation, the plaintiff was dismissed from service of the Missouri Pacific Railroad.

Pursuant to the provisions of the union contract, the Brotherhood of Railroad Trainmen proceeded to process a grievance for plaintiff. Reinstatement with pay. This was disallowed by the division superintendent and a subsequent appeal was made to the general manager. In accordance with the procedure of the union contract, the general manager of the railroad were the appropriate parties to that appeal. In December of 1964, the union withdrew its support for the grievance. Plaintiff was sold down the river. Next step would have been to the Director of Labor Relations, then to for submission to the National Railroad

Labor Adjustment Board.

Plaintiff contacted Allan R. Browne a few months after dismissal just to make sure not to miss out on any steps he had to take. Inasmuch as he had been hurt on the job with a bad head injury in January, 1964, about a week before the anonymous call came up by the railroad officials, and being bothered by the injury going to the doctor for treatments three and four times a week. Later, Allan R. Browne informed the plaintiff he would have to sue the union and the Missouri Pacific Railroad.

March 21, 1966, case No. 676763, Breach of Contract by wrongful discharge was filed by Allan R. Browne. The general theory of which was an action in contract against the union for failing to provide the plaintiff with appropriate representation as provided in the union agreement. That case was removed to the United States

District Court for the Western District of Missouri and, thereafter, was dismissed without prejudice.

September 1, 1967, case No. 707638, a subsequent action was filed by Browne. "Hobart W. Fischer V. Brotherhood of Railroad Trainmen and Missouri Pacific Railroad Company," which was removed to the Federal District Court, on order of the Federal District Court, was remanded to the Circuit Court of Jackson County Missouri. That case was in contract against the union and for wrongful discharge against the railroad. The case was continued upon the docket of the Jackson County Circuit Court and was at various stages handled by various of the Circuit Judges in Jackson County.

In 1969, settlement negotiations were undertaken between the attorneys for the Missouri Pacific Railroad and Browne.

Browne communicated to the plaintiff an offer to settle and comprise for $2,000, which plaintiff refused.

On February 20, 1969, Browne wrote to the plaintiff and informed him that he was withdrawing from the case. That withdrawal was accomplished by a written withdrawal consented to by the Court on March 3. Browne had no further connection with the litigation.

Robert A. Dakopolos agreed to continue about a week later, but did not make his formal entry of appearance until November 18, 1969.

By August of 1970, the case had reached the docket of Judge Stubbs in the Circuit Court and was pending upon motions for summary Judgment filed by the railroad and the union. These motions had been filed and briefed by the parties and were under submission to Judge Stubbs. On August 14,

1970, Judge Stubbs communicated with all of the attorneys in the case his order of that date sustaining the motions for summary judgment and requesting that appropriate judgment entries be prepared in the case. Those entries were filed on September 22, 1970.

The issue raised by the motions for summary judgment was whether or not the plaintiff had exhausted his administrative remedies before filing suit for wrongful discharge and for breach of contract.

As noted, the plaintiff filed his pro se action for damages against the defendants, Allan R. Browne and Robert A. Dakopolos, on September 19, 1975, No. CV 75-3267. Both of the defendants filed motions for summary judgments in that suit, which is the subject of the instant appeal. The matter came on before Judge O'Leary for determination of the issues raised by those

motions which were that the pleadings of the plaintiff did not state a cause of action and that the cause of action attempted to be asserted was barred by 516.100 RS MO 1969. Judge O'Leary entered an order denying the motions for summary judgment. Judge O'Leary's order makes it clear that he was not considering the ground of failure to state a cause of action because he believed that the defendants had failed to file a motion to dismiss under Rule 55-27 to properly press that issue to the Court.

The cause was set for trial March 23, 1977. Browne showed up with a new lawyer from the same law firm, who claimed he knew nothing about the case. Browne's lawyers then asked for a special trial date and got one for October 3, 1977.

Plaintiff, who had tried to find legal help from lawyers for about five years,

before filing his pro se, now began looking for a lawyer to handle a jury trial. And happened upon Richard Hoffman, practicing lawyer, on June 20, 1977. Without plaintiff's knowledge, permission or any kind of agreement, sent in his letter of appearance and set aside the trial date. Hoffman began talking about petition being five days over the five-year statute of limitations.

The cause was then set for trial in the division of Judge Marsh and thereafter, was transferred to Division 14 and in February of 1978, before Judge Meyers. Judge Meyers entered an order sustaining the motions for summary judgment on the sole ground that the plaintiff's cause of action was barred by 516.100 and 516.120 RS MO, 1969. Like Hoffman had said, five days over five years, they had plowed me under, and wanting to forget about me.

Plaintiff paid his self-announced lawyer and considered him paid off and out of the way.

Plaintiff appealed his case alone to the Missouri Court of Appeals, Kansas City District No. KCK 30124. Judge David J. Dixon ruled that my time limits had not run, I had not waited five days too long to file, but that I had in fact five days to go, before being barred by five-year statute of limitations. However, the judges blamed plaintiff for not doing the work of his attorney, Robert A. Dakopolos, in checking the files and released Browne on time limits.

The judgment of the Circuit Court sustaining the motion of Allan R. Browne for summary judgment was sustained, and the judgment of Circuit Court sustaining the motion for summary judgment by Robert A. Dakopolos was reversed. The cause remanded

to the Circuit Court for further proceedings on plaintiff's claim against the defendant Robert A. Dakopolos.

On January 4, 1980, back in Circuit Court, defendant entered a motion to dismiss, before Judge James A. Moore, who called a hearing March 6, 1980. Judge Moore, who appeared to know nothing about the case, didn't care to find out and didn't want to know. Richard Hoffman, who had popped up again just before the hearing, showed up at hearing in person, was let to have his say even though I advised the court he was not my attorney, along with my answer to the motion to dismiss and my suggestion in support. I had entered the opinion filed by Judge Dixon of the Missouri Court of Appeals, dated July 31, 1979, believing to give Judge Moore a lot of information quickly, and save time. Judge Moore got up and walked out of the hearing while I was

talking, trying to explain the case to him, and my view.

On March 10, 1980, Judge Moore mailed out an order and judgment sustaining the defendant's motion to dismiss and saying in the very first sentence, "this cause has had a long and covoluted history which will not be traced in its ancient and medieval history." In the second paragraph he goes on to say, "Because of the history and more immediately the opinion of the Court of Appeals (July 31, 1979) this court entered an order February 25, 1980 for the Motion to be treated as one of summary judgment." Rule 55.27 (a) and Rule 74.04. Judge Moore had given defendant a new start, but not me.

Plaintiff again appealed his case to the Missouri Court of Appeals, Western District No. WD 31682. Plaintiff's Brief was rejected by Chief Judge Solbert M. Wasserstrom and granted 30 days to file an amended

brief on June 30, 1980. Amended brief was prepared by Jay Crotchett, practicing attorney new in the area that I happened upon, and sent in a letter of appearance.

On March 2, 1981, Opinion filed for No. WD 31682 by Judge Don W. Kennedy in the Missouri Court of Appeals, Western District, affirming the judgment.

Jay Crotchett then filed for a rehearing or transfer to the Supreme Court of Missouri, Jefferson City, Missouri. This was denied May 11, 1981.

ARGUMENT

1. There are special and important reasons for Granting Certiori in this case.

Judge Moore of the Circuit Court gave the defendant a new start, but not the plaintiff, who was already handicapped plenty working pro se. The Opinion filed July 31, 1979 by Judge Dixon, contains plenty of wrongs by defendants.

"Petitioner had no choice but to file his cause Pro Se," no help from lawyers only after writing state representatives, state and federal officials. Jerry Litton gave me the impression I could still get my case to the National Railroad Adjustment Board, and I did sumbit my case, they said they had no choice but to rule in favor of the railroad because of the time limits.

2. It was not until about March 10, 1977, when I got an answer from the Missouri Pacific Railroad Company in answer to my submission that I found out what was wrong with my court cases. Even though Audley Vonck, practicing attorney checked the court files July 28, 1973, said they opened the barn door and turned the horses out, nothing more to do.

3. Allan R. Browne had deliberately let the time limits run and runied my case

with the railroad.

4. Robert A. Dakopolos entered his formal appearance and let me believe my case was still coming up.

5. The facts and the proof are all in the exhibits, they tell the story.

6. The problem with practicing lawyer Richard Hoffman and his non-interest in my jury trial, whose only interest was to double-cross me and help a friend and member of the bar. It must be said either all the lawyers at the February, 1978 trial, including Judge Meyers, were either crooked or incompetent. They were all together on it.

7. Then Richard Hoffman showing up again, on his own, not wanted, just before and at the hearing by Judge Moore, to cause more trouble and confusion. Was his only interest in the case to help his friend, dear member of the bar, and hurt me? Judge

Moore allowed him to have his say yet it was not included in the transcript.

8. Then, back in the Court of Appeals and a new set of judges who determined that appellants pro se petition failed to state a claim upon which relief could be granted. No new start for me. Not fair. The court did not consider in its opinion the question of whether or not a pro se pleading should be held to the same standard as a pleading drafted by an attorney.

9. Appellant had cited a federal case Ghadiall V. Delaware State Medical Society, et al, .48 F. Supp. 789 (Delaware D.C. 1943) which stated that a court should construe pro se pleadings "without regard for technicalities." There is no mention of this case nor any attempt to deal with the pro se question, in the Court's opinion.

10. Respondents tactic had changed, from the time limits to a brand new start

from the beginning. Judge Moore should never have dismissed defendant Dakopolos as he made it very clear he was not going to trace back my case, shirking his responsibility, also at the hearing walking out while petitioner was talking trying to explain.

11. Judge Wasserstrom, knowing this, should never have rejected my brief.

12. Judge Kennedy, knowing this, should never have dismissed respondant Dakopolos in the Opinion filed date March 2, 1981. In addition, he says on March 10, 1980, the trial court sustained defendant Dakopolos' motion to dismiss plaintiff's pro se petition for damages. The dismissed petition undertook to state a claim against the Missouri Pacific Railroad Company.

13. This cause was not a personal injury claim and defendant Dakopolos never had my injury case. The injury case was

Louis J. Pelofsky's, practicing attorney, who deliberately failed to answer interrogatories.

14. The Missouri Supreme Court, naturally, was also wrong in denying the transfer, in the order dated May 11, 1981.

15. Audley Vonck, practicing lawyer, checked the court files for petitioner in July of 1973, on the warning of a practicing attorney in Ike Skelton's office in Lexington, Missouri, who said it doesn't look good. Vonck said this all hangs together, they opened up the barn door and turned the horses out, and they are so far out now there is nothing I can do. And this false information continued from other practicing attorneys, and I filed my petition on a hunch.

16. Petitioner realizes his pro se petition may not be perfect as to and per rule. At the time of writing petitioner

never even knew it was to be written according to rule. And with all the lawyers had never even dreamed of it ever having become necessary to do it himself.

17. Petitioner admits also he is not perfect, and knows that lawyers are not perfect, that judges are not perfect, the courts are not perfect, and that the legal system is not perfect. No one is perfect.

18. But when it is so easy to see and proven by the facts and exhibits, looking at the merits, and the pro se petition, the great amount of money loss to petitioner amoung other things, life style, and mental anguish, so much damage caused deliberately and willfully, by defendant, respondant. This cannot be overlooked, and should not be plowed under and forgotten. If there is to be any kind of justice, or decency in the courts.

19. Defendant, Respondant, Dakopolos'

wrongful acts, by not sueing Allan R. Browne, for not getting my case to the National Railroad Adjustment Board, and not filing an appeal from Judge Stubbs' order dated September 14, 1970 and perfecting that appeal, has caused all the money damages in earnings loss, insurance, pension, loss of life style, mental anguish, etc. and so on down the line.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that a writ of certiorari should issue to review judgment, and not be made to suffer more. The loss of an important right to have a trial on the merits by a jury.

The remedy is simple; permit a jury trial and a verdict by the jury.

Respectfully submitted

Hobert W. Fischer
510 East 29th Ave
No. Kansas City, MO 64116
(816) 471-2667

Pro Se

APPENDIX A

IN THE CIRCUIT COURT OF

JACKSON COUNTY, MISSOURI

HOBERT W. FISCHER, Plaintiff	)	Case No. CV75-3267
vs.	)	Docket "A"
ALLAN R. BROWNE, et al Defendant.	)	

ORDER MEMORANDUM

New counsel having entered their appearance herein as attorneys of record for defendant Allan R. Browne, motion of B. William Jacob and Bagby, Benjamin and Arnold to withdraw as attorneys of record for said defendant is hereby granted. Said attorneys may file and serve their formal withdrawal as such attorneys within ten (10) days of this date.

Plaintiff's application for continuance is granted and this cause is hereby continued and removed from the trial docket for

the week of October 25, 1976.

It is further ordered that this cause be and hereby is placed on the trial docket for the week of January 10, 1977.

(Signed)

William J. Marsh

Judge

October 6, 1976

IN THE CIRCUIT COURT OF

JACKSON COUNTY, MISSOURI

HOBERT W. FISCHER, Plaintiff,	)	
vs.	)	No. CV 75-3267
ALLAN R. BROWNE and ROBERT A. DAKOPOLAS, Defendants.	)	CIVIL A

O R D E R

Defendants Allen Browne and Robert Dakopolas filed their Separate Motion for Summary Judgment in this cause.

The primary assertion in both motions is that the Statute of Limitations had run on any possible cause of action against these defendants at the time the plaintiff filed his petition. In addition these defendants assert that plaintiff's petition fails to state a claim upon which relief can be granted and that the petition is so deficient that it provides no

criterion upon which to construe any change or amendment to the petition.

In the posture of this case it is very difficult for the Court to determine if the case in fact does not present any genuine issue as to any material fact so as to entitle defendants to judgment.

It is clear that the plaintiff's petition does not comply with Rule 55.05 which requires a short and plain statement of the facts and showing that the pleader is entitled to relief. However, no motion to make more definite and certain was ever filed and further defendants have no specifically moved to dismiss plaintiff's petition for failure to state a claim upon which relief can be granted under the provisions of Rule 55.27. Such a motion can be treated as a motion for Summary Judgment by the Court if the Court allows matters outside the pleadings to be presented and the parties are notified that this is the

manner in which the Court is proceeding.

The Court does not believe that in this instance this procedure was followed that it is clear to all parties that the Court is considering the motions filed as motions to dismiss for failure to state a claim upon which relief can be granted. Rather it seems that the motions filed by defendants consider this defense as somewhat of an aside or a collateral argument as to why they should prevail. Therefore the Court is not ruling that defense in this order. If the defendants wish to raise that particular defense on a motion to dismiss it should be done in accordance with Rule 55.27 so that all parties will have a clear understanding of the procedure.

As to the defense of the running of the Statute of Limitations and the employment of the fule that the cause of action accrues when the damage resulting therefrom is sustained and is capable of ascertainment

the Court cannot speculate on what ultimate facts plaintiff is relying for recovery and then apply the applicable rules.

As both defendants point out in their suggestions, plaintiff does not plead specific negligent acts or dates from which the Court can glean the ultimate facts on which he relies for recovery, but rather his pleading, at best, is a "notice" pleading advising generally of the nature of his suit.

For the reasons set out the defendants have not shown by unassailable proof that there is no genuine issue of fact. There are a number of factual assertions made in the suggestions and arguments as well as other factual data that is not before the Court for consideration and which should be supplied by stipulation or affidavits on any future motion for Summary Judgment.

For these reasons the motions of both defendants for Summary Judgment are denied.

This cause is set for trial in Division 1 before Judge Marsh on February 6, 1978.

(Signed)

Timothy D. O'Leary

Judge

Dated this 29th day of December, 1977.

IN THE CIRCUIT COURT OF

JACKSON COUNTY, MISSOURI

HOBERT W. FISCHER, Plaintiff,	)	
vs.	)	Case No. CV75-3267
ALLAN R. BROWNE, and ROBERT A. DAKOPOLAS, Defendants.	)	Civil Docket "F"
	)	Division No. 14

JOURNAL ENTRY AND ORDER

On February 7, 1978, the parties appeared in person and by their respective counsel, for a hearing on the separate motion of each Defendant for a summary judgment in favor of each Defendant and against the Plaintiff. After evidence is adduced and upon review of all affidavits and exhibits, the Court finds by the uncontradicted sworn testimony of the Plaintiff, that the Plaintiff's cause of action

against each Defendant is barred as a matter of law under the provisions of Section 516.100 and 516.120 (4) R.S.Mo. 1969, and that the motion for summary judgment in favor of each Defendant should be, and is hereby sustained.

It is therefore ORDERED, ADJUDGED AND DECREED that judgment is hereby entered, sustaining the motion of each Defendant for summary judgment against the Plaintiff, and at the cost of the Plaintiff.

Dated this 15th day of February, 1978.

(Signed)

Robert A. Meyers

Judge

MISSOURI COURT OF APPEALS

WESTERN DISTRICT

HOBERT W. FISCHER,

Plaintiff-
Appellant,

vs.

ALLAN R. BROWNE and
ROBERT A. DAKOPOLOS,

Defendants-
Respondents

No. KCD30124

OPINION FILED:

July 31, 1979

APPEAL FROM THE CIRCUIT COURT

OF JACKSON COUNTY

Honorable Robert A. Meyers, Judge

Before Dixon, P.J., Turnage, J., and Kennedy, J.

This appeal is from an order of the circuit court which sustained both of the defendants' motions for summary judgment. The appellant, plaintiff below, filed a petition for malpractice against Allan R. Browne, respondent, and Robert A. Dakopolos,

respondent, both practicing attorneys. The claim relates to a suit filed on behalf of plaintiff by defendant Allan R. Browne against plaintiff's former employer, the Missouri Pacific Railroad Company, and plaintiff's union, The Brotherhood of Railroad Trainmen. The parties will be referred to as they were designated in the circuit court.

Plaintiff's petition was filed pro se and his appeal has been prosecuted pro se. A respondent's brief has been filed on behalf of defendant Allan R. Browne, but no brief has been filed on behalf of respondent, Robert A. Dakopolos. The brief of the plaintiff is totally inadequate to comply with the rules of procedure concerning briefs. Despite the clear and total violation of Rule 84.04 and all of its subparts, the defendants' motion to dismiss the appeal will be denied. Under the provisions of Rule 84.08, this court will

waive compliance with the provisions of Rule 84.04 and consider the appeal on its merits.

If the plaintiff's pro se petition stood alone, it would be impossible to ascertain the basis for his claim. However, both defendants failed to file a motion to dismiss and engaged in extensive discovery resulting in a fairly clear definition of plaintiff's claims. Simply put, the plaintiff claims that the defendant, Allan R. Browne, was negligent in failing to pursue plaintiff's administrative remedies under a collective bargaining agreement before filing suit. As to the defendant, Robert A. Dakopolos, plaintiff asserts he was negligent in failing to take an appeal in the underlying litigation after defendant, Allan R. Browne, withdrew from the case and defendant, Robert A. Dakopolos, undertook the representation. To understand the claims of the plaintiff, it becomes necessary

necessary to give an extensive chronological review of the circumstances of the initial claim for wrongful discharge and the various legal proceedings which followed.

This recital of proceedings has been made difficult by the various exhibits filed by the plaintiff which have no relevancy to the issues. One hundred eleven exhibits were filed originally, consisting primarily of letters from the plaintiff to various officials seeking assistance with his legal problems and correspondence with federal agencies concerning his claim under the federal law affecting railroad employees. Plaintiff has likewise filed what purports to be complete copies of the court files in the underlying circuit court litigation, but they are not complete nor are they in order. To be sure that the chronology of events recited herein is correct, the original court files have been examined

fully. The following statement of fact is taken both from the materials supplied by the plaintiff in connection with this appeal, and from the original court files of the Jackson County Circuit Court.

On February 9, 1964, anonymous calls were made to railroad officials from a phone located in the freight yard in Kansas City. An investigation was made on February 11, 1964 concerning the responsibility of the plaintiff for the telephone call. Upon the basis of that investigation, the plaintiff was dismissed from the service of the Missouri Pacific Railroad.

Pursuant to the provisions of the union contract, the Brotherhood of Railroad Trainmen proceeded to process a grievance for plaintiff. This was disallowed by the division superintendent and a subsequent appeal was made to the general manager. In accordance with the procedures of the union contract, the general chairman of

the union and the general manager of the railroad were the appropraite parties to that appeal. In December of 1964, the union withdrew its support for the grievance. There were apparently other procedures available for review of the claimed grievance, a detailed recitation of which is unnecessary for the purposes of this opinion.

The plaintiff then contacted Allan R. Browne who undertook to represent him in an appeal within the union to reverse the union's decision to abandon the grievance. Mr. Browne did, in fact, appear before the appropriate tribunal of the union, and that board refused to take any further action in connection with the plaintiff's grievance against the Missouri Pacific.

Mr. Browne then filed a lawsuit in the Circuit Court of Jackson County, Missouri, No. 676763, "Hobert W. Fischer v.

The Brotherhood of Railroad Trainmen, et al.," the general theory of which was an action in contract against the union for failing to provide plaintiff with appropriate representation as provided in the union agreement. That case was removed to the United States District Court for the Western District of Missouri and, thereafter, was dismissed without prejudice.

Mr. Browne then filed a subsequent action, No. 707638, "Hobert W. Fischer v. Brotherhood of Railroad Trainmen and Missouri Pacific Railroad Company," which was removed to the Federal District Court but, on order of the Federal District Court, was remanded to the Circuit Court of Jackson County, Missouri. That case was in contract against the union and for wrongful discharge against the railroad. The case continued upon the docket of the Jackson County Circuit Court and was at

various stages handled by various of the circuit judges in Jackson County.

In the year 1969, settlement negotiations were undertaken between the attorneys for the Missouri Pacific Railroad and Mr. Browne. Mr. Browne communicated to the plaintiff an offer to settle and compromise the litigation for $2,000, which the plaintiff refused to accept.

On February 20, 1970, Mr. Browne wrote to the plaintiff and informed him that he was withdrawing from the case. That withdrawal was accomplished by a written withdrawal consented to by the court on March 3. Mr. Browne had no further connection with the litigation. There can be no doubt that Mr. Browne's withdrawal was clearly and unequivocally communicated to the plaintiff.

The defendant Dakopolos apparently accepted employment by the plaintiff at some point after Mr. Browne withdrew, but

did not enter a formal entry of appearance until shortly before final disposition of the case. The file reflects that despite defendant Dakopolos' failure to formally enter his appearance, the attorneys for the union and for the railroad were aware of his representation, as was the circuit court. Mr. Dakopolos was informed of the various preceedings in the case by service of the necessary papers upon him.

By August of 1970, the case had reached the docket of Judge Stubbs in the circuit court and was pending upon motions for summary judgment filed by the railroad and the union. These motions had been filed and briefed by the parties and were under submission to Judge Stubbs. On August 14, 1970, Judge Stubbs communicated with all of the attorneys in the case his order of that date sustaining the motions for summary judgment and requesting that appropriate judgment entries be prepared in the case.

Those judgment entries were filed on September 22, 1970. The order and judgment entry is dated and signed by the judge as entered on that date, but it is clear from the original entry in the case that he determined and ruled the motions for summary judgment on August 14, 1970 and so advised all of the attorneys in the case.

The issue raised by the motions for summary judgment was whether or not the plaintiff had exhausted his administrative remedies before filing his suit for wrongful discharge and for breach of contract. The merits of Judge Stubbs' ruling do not need to be examined here, nor is any implication intended with respect to the propriety or correctness of that order by this court.

As noted, the plaintiff filed his pro se action for damages against the defendants, Allan R. Browne and Robert Dakopolos, on September 19, 1975. Both of the

defendants filed motions for summary judgment in that suit, which is the subject of the instant appeal. The matter came on before Judge O'Leary for determination of the issues raised by those motions which were, that the pleadings of the plaintiff did not state the cause of action and that the cause of action attempted to be asserted was barred by § 516.100 RSMo 1969. By that time, an attorney had entered his appearance in the case representing the plaintiff. In December of 1977, Judge O'Leary entered an order denying the motions for summary judgment. Judge O'Leary's order makes it clear that he was not considering the ground of failure to state a cause of action because he believed that the defendants had failed to file a motion to dismiss under Rule 55.27 to properly present that issue to the court.

The cause was then set for trial in the division of Judge Marsh and, thereafter,

was transferred to Division 14 and, in February of 1978, a hearing was held before Judge Meyers. Evidence was presented by the plaintiff, and various exhibits were introduced by the defendants. Judge Meyers then entered an order sustaining the motions for summary judgment on the sole ground that the plaintiff's cause of action was barred by § § 516.100 and 516.120 RSMo 1969.

At the hearing before Judge Meyers, the defendants objected to plaintiff's testimony on the grounds that he had not contested the affidavits filed by defendants in support of their motions for summary judgment, but Judge Meyers permitted the plaintiff to testify. The substance of this testimony constituted an admission by the plaintiff that his claim against Allan R. Browne was predicated upon Browne's failure to pursue his administrative remedies for his dismissal by the Missouri Pacific thus

causing Judge Stubbs to sustain the motions for summary judgment in that litigation. The plaintiff further admitted that Browne had had no connection with the case since Browne's withdrawal in early 1970, some months prior to the order by Judge Stubbs.

Before undertaking to determine the propriety of Judge Meyers' order sustaining the motions for summary judgment on the theory that the plaintiff's claim was barred by the statute of limitations, some discussion of the appropriate and controlling legal principles is necessary. A statute of limitations constitutes an absolute bar to an action, however meritorious, if the appropriate period of limitations has elapsed. There can be no dispute that the period of limitation that applies to this case is that prescribed by § 516.120, a period of five years. The critical issue in this case, as in most cases involving the statute of limitations, is the

interpretation and application of § 516.100, which reads as follows:

> "516.100. Period of limitation prescribed--Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued; provided, that for the purposes of sections 516.100 to 516.370, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained."

The quoted language declares that the period of limitations begins "when the damage resulting therefrom is sustained and is capable of ascertainment." That language as it applies to causes of action for malpractice by attorneys has been interpreted and applied by the Supreme Court of Missouri in Jepson v. Stubbs, 555 S.W.2d 307 (Mo. banc 1977). In that case, the plaintiff argued that the statute of limitations should not begin to run until the discovery

by a plaintiff that his attorney had committed an act of malpractice. The Supreme Court held that the language of § 516.100, quoted above, extablished a "capable of ascertainment" test for the application of statutes of limitation. That test is set forth in Chemical Workers Basic Union v. Arnold Savings Bank, 411 S.W. 2d 159 (Mo. banc I966), where the court also rejected the argument that the statute of limitation should run upon discovery of the harm. The court in Jepson, supra at 313, pointed out that the legislature had, in fact, provided for a discovery test in cases of fraud, § 516.120 (5) and in § 516.105 for medical malpractice and that if the legislature intended for a discovery theory or test to be applied to actions against attorneys, it would have so provided. The court in Jepson pointed out that the court was without authority to rewrite the statute and

provide a different test in the special case of malpractice by attorneys. Thus, put in plain and simple language, the question becomes whether or not the damages which plaintiff claims he received were capable of ascertainment more than five years prior to September 19, 1975, the date upon which he filed his lawsuit against defendants Browne and Dakopolos. Upon the authority of the cited cases, the discovery of the damages by plaintiff is immaterial.

As to the defendant, Allan R. Browne, it is clear that the plaintiff's claim is that Browne failed to properly pursue the administrative remedies available to the plaintiff resulting in Judge Stubbs' ruling of August 14, 1970, sustaining the motions for summary judgment filed by the railroad and the union against the plaintiff's claim for wrongful discharge and breach of contract. While it might be argued that the alleged damages from such

action by the defendant Allan R. Browne were ascertained as soon as the motions for summary judgment were filed--since the motions clearly and unequivocally raised the issue and the plaintiff was personally served--that early date need not be considered in this case. Under the facts of this case, it was clear that the claimed damage was capable of ascertainment when Judge Stubbs' order sustaining the motions for summary judgment was entered on the 14th of September, 1970.

For the limited purpose of determining the propriety of the trial court's action in finding that the statute barred plaintiff's claim, it has been assumed that some action or inaction of Allen R. Browne constituted negligence. That assumption should, in no way, be interpreted as a holding by this court that such negligence existed or that plaintiff suffered any damage. To the contrary, the record

demonstrates that Allan R. Browne was a zealous and competent advocate for the plaintiff. Thus, even if an assumption of negligence be indulged, the claimed damages were ascertainable on September 14, 1970. The filing of plaintiff's malpractice action five years and five days later, on September 19, 1975, was barred by the statute of limitation.

The claim of the plaintiff with respect to defendant Dakopolos' failure to perform his duties as the plaintiff's attorney relates to the failure to file a notice of appeal and perfect an appeal on behalf of the plaintiff from Judge Stubbs' order of August 14, 1970. No damage would have been sustained by the plaintiff for this particular claim of negligence on the part of his attorney until the time for filing of an appeal from Judge Stubbs' order had expired. The order became a final judgment on September 14, 1970, and the time

for filing a notice of appeal would have expired on September 24, 1970. Therefore, the plaintiff's cause of action did not accrue until that date. Upon that basis, the plaintiff's claim against the defendant Dakopolis is not barred by the 5-year statute of limitations since his cause of action was filed on September 19, 1975, less than five years from the date when that cause of action accrued and the damage, if any, was sustained. Again, it must be noted that this opinion is not an expression by this court that Robert A. Dakopolos was negligent or that plaintiff was damaged. The determination of those issues must await the trial of the issue.

The judgment of the Circuit Court sustaining the motion of Allan R. Browne for summary judgment is sustained, and the judgment of the Circuit Court sustaining the motion for summary judgment filed by Robert A. Dakopolos is reversed. The cause

is remanded to the Circuit Court for further proceedings on plaintiff's claim against the defendant Robert A. Dakopolos.

All concur.

David J. Dixon, Judge

IN THE CIRCUIT COURT OF

JACKSON COUNTY, MISSOURI

HOBERT W. FISCHER,) Plaintiff) vs. ROBER DAKOPOLOS Defendant)	No. CV75-3267 Docket "F"

O R D E R

MOTION OF DEFENDANT ROBERT A. DAKOPOLOS TO DISMISS PLAINTIFF'S PETITION FOR DAMAGES taken up in open court with counsel for both plaintiff and defendant present.

Defendant stands on his suggestions filed January 4, 1980.

Withdrawal of Mr. Helfan approved.

The Motion To Dismiss is taken under advisement.

(Signed)

James A. Moore

Judge

March 6, 1980

IN THE MISSOURI COURT OF APPEALS

WESTERN DISTRICT

Hobert W. Fisher, Appellant,	)	
v.	)	WD 31682
Robert Dakopolos, Respondent.	)	

O R D E R

NOW ON THIS DAY the Court, after reviewing Appellant's brief and being fully advised in the premises, does hereby order and decree that Appellant's brief be stricken for failure to comply with Supreme Court Rule 84.04 (b), (c), (d) and (e) in light of Thummel v. King, 570 S.W.2d 679 (Mo. banc 1978).

IT IS THEREFORE ORDERED that Appellant be and is hereby granted 30 days from this date to file an amended brief; Respondent's brief due 30 days thereafter.

Dated this 30th day of June, 1980.

(Signed)

Solbert M. Wasserstrom,
Chief Judge

IN THE CIRCUIT COURT OF

JACKSON COUNTY, MISSOURI

HOBERT W. FISCHER, Plaintiff,	)	
vs.	)	Case No. CV75-3267
ROBERT DAKOPOLOS, Defendant	)	DOCKET "F"

ORDER AND JUDGMENT

This cause has had a long and covoluted history which will not be traced in its ancient and medieval history. The current issue is raised by defendant Dakopolos' MOTION TO DISMISS filed January 4, 1980.

Because of the history and more immediately the opinion of the Court of Appeals (July 31, 1979) this court entered an Order February 25, 1980 for the Motion to be treated as one for summary judgment. Rule 55.27 (a) and Rule 74.04.

This came on for hearing March 6, 1980.

Plaintiff appeared in person and his attorney Hoffman was finally allowed to withdraw when plaintiff said that Mr. Hoffman was not his attorney. Defendant stood on his supporting suggestions filed January 4, 1980. The Motion was taken under advisement. No additional evidence was presented by plaintiff or defendant Dakopolos.

The Motion as amplified by the Suggestions in Support appears to be meritorious and should be sustained. Accordingly, it is ORDERED that Motion of Defendant Robert A. Dakopolos to Dismiss Plaintiff's Petition for Damages be and is hereby SUSTAINED.

It appearing that this cause has heretofore been disposed of as to defendant Allan R. Browne, this cause should be finally disposed of as to all issues and all parties.

Wherefore, it is CONSIDERED and ADJUDGED that defendants go hence without

delay and have and recover their costs, for which let execution issue.

(Signed)

James A. Moore

Judge

March 10, 1980

Supreme Court No. 62974

In the Supreme Court of Missouri

Western District No. 31682

May Session 19 81

Robert Fischer, Appellant,

vs. TRANSFER

Robert A. Dakopolus, Respondent.

Now at this day, on consideration of Appellant's application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 19 81, and on the 11th day of May 19 81, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 11th day of May, 1981.

Thomas F. Simon Clerk.

Anne Burkart D. C.

CERTIFICATE OF SERVICE

The Undersigned hereby certifies that he delivered three (3) copies of the foregoing Petition for Certiorari, on June 26, 1981, to:

Thomas J. Cox, Jr. #17784
1700 Traders Bank Building
1125 Grand Avenue
Kansas City, MO 64106
(816) 842-5161

Hobart W. Fischer
516 East 29th Ave
No. Kansas City, MO 64116
(816) 471-2667